

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

DIAGNOSTIC RESOURCE GROUP, LLC \*  
Plaintiff

**U.S. District Court Civ. No. L-02-3020**  
Removed from Baltimore County Circuit  
Court Case No.: 03-C-02-006016

v.

\*

TOSHIBA AMERICA MEDICAL  
SYSTEMS, INC.

\*

Defendant

\*

\* \* \* \* \*

**SUPPLEMENT OF June 26, 2003 TO  
DEFENDANT TOSHIBA'S MOTION FOR SUMMARY JUDGMENT  
ON BASIS OF STATUTE OF LIMITATIONS**

Now comes, Defendant Toshiba America Medical Systems, Inc. ("Toshiba"), by its counsel, Brooke Schumm III, Daneker, McIntire, Schumm, Prince, Goldstein, Manning & Widmann, P.C. and moves for summary judgment because Counts I and II comprising the case are barred by the statute of limitations:

**Procedural Introduction**

On March 26, 2003, the Honorable Benson E. Legg, speaking for the Court, stated he believed the Court should first address the issue of the applicability of the statute of limitations. Judge Legg stated he would set a schedule first on the Motion for Summary Judgment by Toshiba. He stated that Toshiba could simply adopt by reference its prior Summary Judgment Motion [Defendant Toshiba's Motion for Summary Judgment on Basis of Statute of Limitations and Contract Terms Limiting Damages filed December 13, 2002] (the "Summary Judgment Motion"), Reply [Toshiba's Reply to Plaintiff's Response to Defendant Toshiba's Motion for Summary Judgment on Basis of Statute of Limitations and Contract Terms Limiting Damages filed (the "Reply")] and Supplement [Supplement to Defendant Toshiba's Motion for Summary

Judgment on Basis of Statute of Limitations with Additional Documents Produced by Plaintiff (the "Supplement") (Docket Numbers 17, 24, 29) and supplement those filings as needed.

### Introduction

Resummarizing the earlier introductions, the Plaintiff's claims are barred because suit was filed almost five years after the date of the contract, and more than four years after an "OPART" magnetic resonance imaging system was delivered to Plaintiff Diagnostic Resource Group ("DRG").

The additional material in this Supplement relates to admissions from a complaint by Plaintiff on the same subject matter (which was not produced in discovery by Plaintiff) and admissions by Ms. Kimberly Stehman, a radiation technologist and office manager at DRG, and Dr. Phillip Templeton, a radiologist associated with DRG. The same claims were asserted in the Circuit Court for Baltimore County in November, 1999 against Toshiba in Baltimore County Case No. 03-C-99-010638 filed November 1, 1999. The case was apparently dismissed for want of prosecution (hereafter referred to as the "Baltimore County Complaint").

### Undisputed Facts

1. The facts stated in the Summary Judgment Motion, Reply, and Supplement, and supporting affidavits thereto are adopted herein.
2. For purposes of this Motion, the relevant date of the DRG Complaint for limitations purposes is May 30, 2002.
3. The goods involved are a magnetic resonance imaging machine called an OPART ("MRI" or OPART MRI). The sale price was \$850,000.00. The sale was financed through a typical finance lease by a third party, Tokai Financial Services, Inc. ("Tokai"). The successor in interest to Tokai Financial Services, Inc. was De Lage Lange. Nothing

was ever paid for the OPART MRI by DRG to either the equipment lessor or its successor nor to Defendant Toshiba America Medical Systems, Inc.

4. The sale of the goods at issue in this lawsuit occurred pursuant to a writing between the parties dated July 21, 1997, signed by Jeffrey Lowe, the President of the Debtor. (the "Contract"). See Exhibit A-1 to Summary Judgment Motion . The 2<sup>nd</sup> page of the Contract containing terms and conditions of sale has been enlarged and is attached as Exhibit A-2 to that Motion and as Exhibit A-2 to this Supplement.
5. The warranty under the Contract expired one year from the date of installation, i.e. on April 1, 1999. The Contract provided in Paragraph 8:

"For the warranty period described below by product, Toshiba, as its only obligation, will replace or repair, at Toshiba's option and without charge to Customer during Toshiba's normal working hours (if Customer requests warranty service outside such hours, Customer will pay overtime premium for labor, any component of the equipment determined by Toshiba to be defective in materials or workmanship, provided such defect is reported to Toshiba within the warranty period. Toshiba's warranty period is as follows: (a) X-Ray and Therapy- 6 months from the date of completion of installation; (b) Ultrasound, C.T., Nuclear, ***MRI-1 year from the date of installation***; (c) Probes-12 months from the date of completion of installation. Toshiba does not warrant that operation of the Equipment will be uninterrupted. Components not manufactured by Toshiba, including but no limited to X-Ray tubes, monitors, glassware, VTRS, cameras, computer equipment, and software will be furnished subject only to the manufacturer's warranty, if any, and without any warranty whatsoever by Toshiba. During the warranty period, Toshiba will furnish free of charge any upgrades, including software required to correct any defect in the Equipment or as required under applicable laws.

TOSHIBA'S OBLIGATION TO REPAIR OR REPLACE DEFECTIVE PARTS WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR A BREACH OF THE WARRANTY SET FORTH IN THIS SECTION. SUCH WARRANTY WILL BE IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE WARRANTIES OF THE MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. The warranty set forth in this Section will not apply to, and Toshiba will not be liable for any defects resulting from misuse, repairs performed by unauthorized third parties, accidents, acts of God, or neglect of anyone other than Toshiba. [emphasis supplied]."

Exh. A-2 at ¶8.

6. Further, Paragraph 19 entitled “ENTIRE AGREEMENT,” contained an integration clause:

“This Agreement contains the entire agreement between the parties and supersedes all prior or concurrent agreements between the parties, whether oral or written, relating to its subject matter. The provisions of this agreement may not be modified unless in writing and executed by both parties.”

Exh. A-2 at ¶19.

7. No written modification of the warranty or of the limitation of damages occurred.
8. The warranty expired in April, 1999. Without modifying the specific terms, the warranty can be generically described as a “replace or repair” warranty on the Toshiba manufactured parts for one year. Thereafter, Toshiba had no contractual duty to Diagnostic Resource Group.
9. Upon Subpoena for documents by Plaintiff, De Lage Lande (successor to Tokai), the medical equipment finance company produced the attached document indicating that a lawsuit had been previously filed and dismissed against Toshiba America Medical Systems, Inc. See Exh. K. (New exhibit numbering begins at the end of the Supplement’s exhibit numbers).
10. On investigation, a copy of the complaint was obtained from the Circuit Court for Baltimore County, Case No. 03-C-99-010638. Exh. L. The filing date of the Complaint was November 1, 1999.
11. The Baltimore County Complaint is styled Diagnostic Resource Group, LLC v. Toshiba America Medical Systems, Inc., and Toshiba America Medical Credit, Inc.

12. The Plaintiff's Baltimore County Complaint in paragraph 7 states: "The Toshiba OPART MRI was delivered and installed at DRG's office in Baltimore County, Maryland, but never performed satisfactorily." See Exh. L, ¶7, p. 2.

13. Ms. Kimberly Stehman, the radiation technologist, testified on March 18, 2003:

5 Q When patients came in, you said you had to  
6 obtain billing information from them.

7 What do you mean by billing information?

8 A Who their insurance company was.

9 Q And what's the purpose of obtaining that  
10 information?

11 A So that it could be billed.

12 Q Okay. Tell me how the billing process  
13 worked.

14 A Bills were submitted to the insurance  
15 companies for MRIs.

16 Q Now, if you had a problem with a scan,  
17 would you send a bill to the insurance company?

18 A Depends on if it was a complete scan or if  
19 it wasn't.

20 Q Well, if you sent a bill, was it a complete  
21 scan?

22 A Yes.

Stehman Dep. 3/18/2003 at 52.

Ms. Stehman had earlier testified:

1 Q Take me through kind of a typical day. A  
2 patient appears. Sort of what happens? You know,  
3 how was the office physically laid out, and so on,  
4 and so forth?

5 MR. SPERLING: Bel Air location?

6 MR. SCHUMM: Bel Air Road.

7 A When they walked into the office, they were  
8 at the reception desk. Paperwork was filled out  
9 there as far as information that was needed from  
10 them.

11 Q And what kind of information would that be?

12 A Name, address, phone number, billing  
13 information, metal questionnaire.

14 MR. SPERLING: Did you say medical

15 questionnaire?

16 THE WITNESS: Metal.

17 MR. SPERLING: Oh, metal.

18 THE WITNESS: Metal.

19 BY MR. SCHUMM:

20 Q What does that mean?

21 A Before anyone can go and have an MRI scan,  
22 we need to find out if there's any metal in their

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1 body that will interfere or cause them harm before  
2 they would enter into the room.

3 Q Okay. And there were two suites there.

4 Which suite did folks enter into, patients  
5 enter into, when they first came into the  
6 receptionist?

7 A I don't know which suite numbers there were  
8 there. I think it's 6 and 8 or 8 and 10, something  
9 like that. One, if you were looking at the building,  
10 it's on the left. I can tell you that.

11 Q Okay. Did it appear to all be sort of one  
12 big area for an office?

13 A Yes.

14 Q Just happened to have two suite numbers?

15 A Yes. Yes.

16 Q All one big area?

17 A Yes.

18 Q Okay. And then was there a room there that  
19 was dedicated to the MRI machine?

20 A Yes.

21 Q And was there a room there dedicated to  
22 maintenance of other equipment that was adjunct to

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1 the MRI machine?

2 A I believe you're probably referring to the  
3 computer room?

4 Q I'm not referring to anything. I'm just  
5 asking you the question.

6 A I don't know.

7 Q Were there other rooms there?

8 A There were, yes.

9 Q Okay. And what other rooms would there be  
10 that would be adjunct to the MRI machine?

11 A There was a computer room. That was the

12 closest thing to it.

13 Q Okay. And what else?

14 A There was a room that actually had the  
15 laser camera in it.

16 Q I'm sorry. Could you say that once more?

17 A room with a what in it?

18 A Laser camera.

19 Q What does the laser camera do?

20 A Allows you to print the images from the MRI  
21 machine onto film.

22 Q Anything else?

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1 A There was a file room. There was a  
2 kitchen. There was a marketing office. There was  
3 changing rooms, bathroom, and one other office and  
4 the reception area.

Stehman Dep. 3/18/2003 at 39-42.

Ms. Stehman continued:

3 Q What's a patient report?

4 A Physician has to read the scan and produce  
5 a report.

6 Q And what physician would read the scan and  
7 produce a report?

8 A Any of the number of physicians at  
9 University.

10 MR. SPERLING: Why don't you spell it out.  
11 University of?

12 THE WITNESS: Maryland.

13 BY MR. SCHUMM:

14 Q And who would those be, their names?

15 A I'm trying to think who read our reports  
16 from over there. There was a Greg Zoarski, I believe  
17 Michael Rothman, Bernadette Stallmeyer, Dr. Resnik,  
18 Dr. Mulligan. They're the ones that come off the top  
19 of my head.

20 Q Okay. So how did it work that they did a  
21 report? Patient comes in. Patient gets scanned.  
22 Then what happens?

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1 A Films are printed. They were transported  
2 down to University of Maryland to be read.

- 3 Q And then what happened to them?  
4 A They were returned back to us.  
5 Q And they were kept in a file cabinet?  
6 A A room.  
7 Q How were they organized in that room?  
8 A Alphabetically.

Stehman Dep. 3/18/2003 at 43-44.

14. A logbook was kept. Ms. Stehman testified:

- 21 Q Was that the only logbook that was kept out  
22 at the Bel Air Road location?

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- 1 A I believe we -- I'm just guessing. From  
2 what I can remember, we probably kept a patient log  
3 just so we knew what scans were done on what  
4 patient. That's pretty typical of most MR places.  
5 Q Any other logbook?  
6 A No, sir.

Stehman Dep. 3/18/2003 at 45-46. (Stehman Dep. Excerpts attached as Exh. M).

15. Copies of the patient logbook were produced and excerpts from April and May, 1998 attached as Exhibits A, B, and D-I (eye) to the Supplement.
16. Attached hereto is one of those exhibits behind Exhibit A showing a patient list commencing April 16, 1998. The Supplemental Motion has the underlying records of billings for patients for the dates in the patient logbook in Exhibits A, B, and D-I (eye) to the Supplement.
17. In his deposition, Dr. Phillip A. Templeton testified he was chairman of radiology at the University of Maryland Medical System complex in Baltimore City. Templeton Dep. at 25-26. Dr. Templeton was unclear as to what position he held with DRG but signed a document as Secretary of the Plaintiff.



18. Dr. Templeton's attention was directed to Bates-Stamped documents 8, 9 and 10 (An application site report for Toshiba's business records prepared by Gloria Sumler on April 28, 1998), Templeton Dep. Exh. 3, Supplement Exh. A, and Exh. N hereto. After reviewing Deposition Exhibit 3, Dr. Templeton testified:

18 Q Okay. Do you recall having a meeting out  
19 there in approximately April of 1998 with the various  
20 persons listed?  
21 A Well, there's a lot of people listed here,  
22 but I remember being there for actually just a brief

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1 period of time.  
2 Q Umh-humh.  
3 A And I remember Kim Stehman and I remember  
4 Gloria Sumler who was the applications person.  
5 Q Umh-humh.  
6 A And I'm really not sure who else was or  
7 wasn't there at the time.  
8 Q Okay. Was a gentleman named Mr. Kent  
9 Stansbury there?  
10 A He could have been. I think I met him at  
11 some point; I don't know if it was that day.  
12 Q And what was the purpose of the meeting?  
13 A They were doing applications and I just went  
14 out to see the system.  
15 Q And did you see the system operate?  
16 A Yes.  
17 Q And did it operate satisfactorily, as best  
18 you could tell?  
19 A As far as I recall.

Templeton Dep. 5/19/03 at 19-20.

Dr. Templeton continued:

20 Q Okay. I'm going to show you what's been  
21 identified as Bates Nos. 607, and attached to it for  
22 some reason is Bates No. 479. But this was produced

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- 1 to us by Diagnostic Resource Group as the records from  
2 April of 1998, and you can see it has a fax line of  
3 5/4/1998. Were you aware that patients were treated  
4 immediately after the date that you had the meeting  
5 with Ms. Sumler and so on?  
6 A As far as I know, I know they did some  
7 patients, yes.

Templeton Dep. 5/19/03 at 20-21. (Templeton Deposition Excerpts attached as Exh. N hereto).

19. Plaintiff's accountant produced a copy of a general ledger of DRG showing income earned from patients as early as April, 1998. Exh. P. An account receivable of \$12,702.00 is shown for April, 1998, and income of \$708.00 which appears to be the \$708.00 check from Francis produced with the partial patient records production by DRG bates-stamped 630. See Exh. E. p. 2.

### ARGUMENT

20. In sum, Plaintiff admitted in the Complaint filed in the Circuit Court for Baltimore County, Maryland on November 1, 1999 that the OPART MRI machine had been delivered and installed. Based on Plaintiff's records, patients were examined and billed as early as April 16, 1998. Ms. Stehman described how the machine was used, and records sent to radiologists for reading, and how patients were billed.
21. There is no possible dispute, much less a genuine dispute, based on the admission in Plaintiff's Baltimore County Complaint (Exh. L), the patient records (e.g. Exh. A and Supplement Exh. B, and D-I), Dr. Templeton's testimony (Exh. O), Ms. Stehman's testimony (Exh. M), and the DRG ledger produced by DRG's accountant showing April income and receivables (Exh. O and P), that installation was complete at least as of April

- 16, 1998, because patients were examined, patient scans sent to radiologists for diagnosis, patient scans returned for filing, patients billed, and patients who paid for services. Dr. Templeton says he saw the system in April with Ms. Sumler at the meeting of personnel stated in her report (consistent with Mr. Hutton's affidavit Supp. Exh. J) on April 10, 1998.
22. Plaintiff's representatives' testimony and documents show that installation was complete in April, 1998.
23. Under the contract, pursuant to which the machine was purchased for \$850,000.00, which is a contract with an "integration clause," (pursuant to which any modification must be in writing), installation was complete at least as of April 16, 1998 based on the patient records.
24. The warranty expired one year from that date, on April 16, 1999.
25. Plaintiff filed suit in November 1999 in Baltimore County, Maryland, but the suit was ultimately dismissed.
26. Plaintiff has now filed suit again against Toshiba in an untimely fashion on May 30, 2002. This is more than three years after the warranty expired, which at latest was one year after April 16, 1998. Plaintiff filed suit more than four years after sale, which at latest was April 16, 1998. Dr. Templeton testified he saw the MRI machine perform scans with Ms. Sumler on April 10, 1998.
27. Plaintiff's claims are indisputably barred by the Maryland statute of limitations.

Applicable Law

28. The Maryland statute of limitations is set forth in the Courts & Judicial Proceedings article.

29. The general statute of limitations is three years.
30. For the sale of goods, the Maryland Uniform Commercial Code provides a statute of limitations of four years.
31. Since the Complaint was filed on May 30, 2002, more than four years after the OPART MRI was installed on March 31, 1998, the Complaint is barred by the Maryland statute of limitations.

WHEREFORE, Defendant Toshiba prays the Complaint be dismissed.

/s/ Brooke Schumm III  
Brooke Schumm III, Esquire  
Fed. Bar No.05001  
Danecker, McIntire, Schumm, Prince,  
Goldstein, Manning & Widmann, P.C.  
One North Charles Street, Suite 2450  
Baltimore, MD 21201

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of June, 2003, a copy of the foregoing Statement was mailed to Samuel Sperling, Law Office of Leonard J. Sperling, 1777 Reisterstown Road, Commercentre West, Suite 212, Baltimore, MD 21208.

/s/ Brooke Schumm III  
Brooke Schumm III